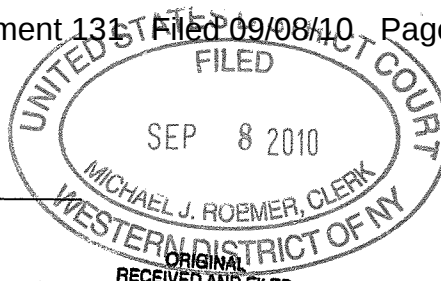


UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

RONALD DAVIDSON,  
PLAINTIFF,

v.

UDAK K. DESAI, M.D., ET. AL.,  
DEFENDANTS.



RECEIVED AND FILED  
UNITED STATES DISTRICT COURT CLERK  
WESTERN DISTRICT OF NEW YORK  
AFFIDAVIT IN OPPOSITION  
TO DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT

SEP 8 2010  
03-CV-121S(F)

BY: \_\_\_\_\_

Pursuant to 28 U.S.C. § 1746. plaintiff Ronald Davidson, pro se, swears under penalty of perjury to the truth of the following statements.

1. I make this affidavit in opposition to defendants' motion to dismiss pursuant to F.R.C.P. 56(d) and motion for summary judgment pursuant to F.R.C.P. 12(C) and 56 (a) along with my annexed memorandum of law in opposition to said motion (defendants' motion is dated 18 November 2009).
2. At the outset, I reiterate all of the allegations set forth in the 260 paragraphs of my complaint.
3. I also respectfully request that the Court review the transcript of the deposition conducted of me by AAG Darren Longo on 29 June 2007, and the documentary exhibits I provided to him at that deposition. (For the Court's convenience I attach a copy of those documents as Exhibit "A.")
4. Additionally, attached hereto is the DOCS' Smoke-Free Policy dated 30 June 1999 which I contend has never been adhered to by defendants, including to this date. Along with the Smoke-Free Policy are copies of tobacco products invoices (cigarettes, cigars, rolling tobacco) covering purchases at the Elmira prison for approximately one year before the Smoke-Free policy went into effect and for approximately one year after said policy went into effect. Exhibit "B."
5. As the Court can see by the invoices obtained by me pursuant to a FOIL request, the amount of tobacco purchased by the DOCS' Elmira prison commissary for re-sale to the prisoner population is virtually identical, i.e., there is no difference between the amount of tobacco products purchased and sold by the DOCS defendants prior to or after their policy went into effect--thus supporting my contention that the policy is a sham and isn't strictly enforced.
6. I submit that the invoices would convince a jury of my claims that defendants failed/refused to enforce their own Smoke-Free Policy as well as N.Y.S. law in effect long before their Smoke-Free Policy was ostensibly put into effect, i.e., Public Health Law's Clean Indoor Air Act (Article 13-H).

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7. Exhibit "C" shows affidavits and grievances attesting to sick call slips "lost" by defendants and denials of sick call.

8. The Court's attention is also called to the deposition exhibits referred to as Exhibit "A" above (defendants' deposition exhibits "E", "F", "G", "H", "I", "J", "K", "L", "M", "N") that show that defendants were well aware of my serious medical condition due to MRI reports showing progressive deterioration of my spine, letters from Kenneth Friedman, Esq. from a prominent New York City law firm, a letter from Jerrold Nadler, Member of Congress, etc., or should have been aware of my serious medical condition but failed to provide me with adequate care or the follow-up care ordered by specialists.

9. This included failing to send copies of the MRI films and report despite being ordered several times by SUNY Health Science Center at Syracuse Staff. Exhibit "D", consultation report dated 2/1/01.

10. Attached as Exhibit "E" are documents pertaining to the denial of pain medicine (methadone) ordered by pain specialists at SUNY Health Science Center at Syracuse.

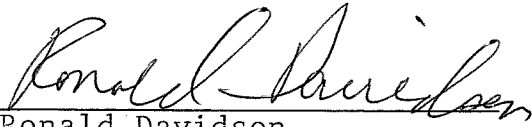
11. Attached as Exhibit "F" are documents from SUNY Upstate Medical Center dated 09 January 2001 and 04 January 2001 supporting the fact that my surgery was cancelled with Dr. Mosher not because of any failure on my part to adhere to SUNY's TB Control Program but as retaliation on the part of defendants.

12. It is noted that I never tested positive for TB nor did I exhibit any respiratory problems. Furthermore, per SUNY's TB Control Policy I should have been given the option of wearing a surgical mask (which I would have done) if SUNY staff felt that was necessary if they weren't satisfied with my chest x-ray on file. I was never given that option. Instead, defendant Fowler, et. al., contacted Dr. Mosher and arranged for the surgery to be cancelled. To date, that surgery has never been re-scheduled despite my numerous requests.

13. The other attached documents amply support my allegations and the need for a jury to make determinations of fact.

Accordingly, defendants' motion should be denied in all respects.

Dated: 21 August 2010

  
Ronald Davidson  
P.O. Box 700, #76A1166  
Wallkill, NY 12589-0700

To: George M. Zimmermann, AAG  
NYS Dept. of Law  
350 Main Street, Ste. 300A  
Buffalo, NY 14202

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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RONALD DAVIDSON, JR.

Docket No.: 03-CV-0121

PLAINTIFF,

-vs-

UDAY DESAI, et. al.,

DEFENDANTS.

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PLAINTIFF'S MEMORANDUM OF LAW  
IN OPPOSITION TO DEFENDANTS' MOTION  
TO DISMISS PURSUANT TO F.R.C.P. 56(a)  
AND MOTION FOR SUMMARY JUDGMENT PURSUANT  
TO F.R.C.P. 12(C) and 56(a), DATED  
18 NOVEMBER 2010

Ronald Davidson  
Pro Se  
#76A1166  
Shawangunk Correctional Facility  
P.O. Box 700  
700 Quick Road  
Wallkill, NY 12589-0700

Dated: 21 August 2010

Copy To:

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## STATEMENT OF FACTS

Plaintiff respectfully refers the Court to my extensive and detailed complaint in this action (260 paragraphs), the transcript of the deposition conducted by the assistant attorney general and the documents provided by me to the AAG at said deposition along with the documents attached as exhibits to my affidavit in opposition to which this memorandum of law is annexed to.

## POINT 1

## DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS

Plaintiff alleges that defendants were deliberately indifferent to his serious medical needs in violation of his rights under the Eighth Amendment, as incorporated by the Fourteenth Amendment. The Eighth Amendment prohibits the infliction of "cruel and unusual punishment," U.S. Const. amend VIII, which includes punishments that involve "the unnecessary and wanton infliction of pain." Estelle v. Gamble, 429 U.S. 97, 104 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)). "This is true whether the indifference is manifested by prison doctors in their response to prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." Estelle, 429 U.S. at 104-05.

A genuine issue of material fact exists as to whether defendants provided plaintiff with adequate medical care ordered by specialists as set forth in the complaint sworn to under penalty of perjury. Regarding my serious back condition, the defendants provided me with over one thousand pages of medical records. These records attest to the fact that defendants failed to heed the treating specialist's orders, e.g., at medical record Bates numbered 508, an entry was made presumably by John D'Souza, M.D., a specialist at the University of Rochester Medical Center, as follows: "call doctor for fever or progressive worsening back pain immediately." This entry was dated 11/24/99. The Court is also referred to medical records Bates numbered 509 and 510. Yet despite these clear-cut orders and my numerous pleas and letters from an attorney representing me pro bono in an unrelated action at the time (Kenneth D. Friedman), defendants refused to call UPMC, Dr. D'Souza or return me immediately to UPMC. This despite an MRI showing serious deterioration of my lower spine taken shortly after an MRI was done on 11/29/99 on an emergency basis when I was transported to a local hospital via ambulance from the Elmira prison infirmary and returned via ambulance to Elmira's infirmary that same day. (A copy of a letter from Kenneth D. Friedman, Esq., dated 24 December 1999 addressed to Shige-Hisa Okawara, M.D., which was copied to defendants Floyd Bennett and Dr. Uday K. DeSais is attached as an exhibit to my affidavit in opposition to defendants' instant motion.)

In fact, at medical record Bates numbered 72, a neurosurgical trip was cancelled on 27 December 1999 with no explanation given. Upon information and belief defendant Floyd Bennett ordered the cancellation appointment scheduled for 27 December 1999.

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It is noted that although defendants' counsel stated he would provide all medical records relevant to the time periods covered by the complaint at no charge to me in order to avoid this Court's order compelling DOCS officials from providing me with sufficient access to my medical files in order to prosecute this action and defend against the instant motion, there is a lapse in the provided medical records during a crucial stage of this complaint, i.e., at Bates medical record numbered 64 dated 11/26/99 to the next entry dated 12/15/99. The Court should compel the production of that lapse in records to the Court and me.

The Court is also respectfully requested to review the transcript of my deposition taken by the AAG in this action which proves that my deposition testimony was neither fanciful nor replete with the level of contradictions and inconsistencies which would cast doubt upon its plausibility. See Shabazz v. Pico, 994 F. Supp. 460, 470-71 (S.D.N.Y. 1998) (disposing of improbable allegations replete with inconsistent and contradictory statements); see also Jeffreys v. City of New York, 426 F. 3d 549 (2d Cir. 2005).

My complaint along with my instant affidavit and exhibits, my deposition testimony and documents provided to the AAG at said deposition make out a prima facie case and supports my contention of supervisory responsibility and liability under the Williams doctrine and Hernandez v. Keane, 341 F. 3d 137, 145 (2d Cir. 2003).

Aside from supervisory liability, a genuine issue of material fact exists as to the physician defendants for failing to follow specialists' orders that caused me excruciating pain and damage in terms of my back problems and the other medical issues set forth in the complaint that are, in objective terms, "sufficiently serious." Hathaway v. Coughlin, 37 F.3d 63, 66 (2d Cir. 1994 (citing Wilson v. Seiter, 501 U.S. 294, 298 (1991))). The complaint, my deposition testimony and the documents provided to the AAG at the deposition, along with my instant affidavit with exhibits submitted in opposition to defendants' instant motion satisfies both the objective and subjective component required. Chance v. Armstrong, 143 F. 3d 698, 702 (2d Cir 1998). (The documentary exhibits alone support my contention that defendants knew of and disregarded an excessive risk to my health, were aware of the facts from which the inference could be drawn that a substantial risk of serious harm existed and must have drawn that inference. Chance 143 F. 3d at 702 (citing Farmer v. Brennan, 511 U.S. 825, 837 (1994)). Thus, the subjective prong has been met.))

Given the delay in returning me to the care of University of Rochester Medical Center specialists (despite my lawyer's letter and my constant complaints putting defendants on notice of the complained of issues) despite the clear orders of John D'Souza, M.D. dated 11/24/99 and the refusal of defendants to comply with other UPMC specialists as set forth in the complaint, a genuine issue of material fact exists as to whether defendants acted with a "culpable state of mind." Wilson 501 U.S. 294. This mental state requires that the charged official acted or failed to act

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while actually aware of a substantial risk that serious inmate harm will result." Salahuddin v. Goord, 467 F. 3d 263, 279-80 (2d Cir. 2006). This mental state is equivalent to subjective recklessness. Farmer v. Brennan, 511 U.S. 825, 836-37. "It is well-established that mere disagreement over the proper the proper treatment does not create a constitutional claim. So long as the treatment given is adequate, the fact that a prisoner might prefer a different treatment does not give rise to an Eighth Amendment Violation." Chance v. Armstrong, 143 F. 3d 698, 703 (2d Cir. 1998). However, "a physician may be deliberately indifferent if he or she consciously chooses 'an easier and less efficacious' treatment plan." Id. (citing Williams v. Vincent, 508 F. 2d 541, 544 (2d Cir. 1974)). See also Colon v. Coughlin.

In the case at bar a genuine issue of material fact exists as to whether defendants chose such an easier and less efficacious treatment plan when they ignored Dr. D'Souza's orders to immediately return me to UPMC if the complained of problems arose and instead chose to place me in the prison infirmary on I.V. antibiotics. This genuine issue of material fact is further supported by the results of a follow-up MRI done on 01/25/00, shortly after the one performed on 11/29/99 showing extensive damage to my spine--damage not present on the 11/29/99 MRI.

The factual allegations in my complaint coupled with documentary evidence makes out a prima facie case as to whether defendants engaged in an "unreasonable delay or interruption in that treatment rather than the prisoner's underlying medical condition alone." Salahuddin, 467 F.3d at 280 (citing Smith v. Carpenter, 316 F.3d 178, 185 (2d Cir. 2003) (internal quotations omitted) (emphasis omitted)). This certainly also covers the allegations of denial of specialists' ordered medical care as set forth in the complaint, e.g., the denial of the allergy desensitization injections and housing free from second-hand cigarette and other tobacco smoke, etc. These factual allegations coupled with my documentary evidence for a reasonable jury to conclude that these defendants knew of and disregarded an excessive risk to my health. See Brock v. Wright, 315 F.3d 158, 164 ("evidence that risk was obvious or otherwise must have been known to a defendant is sufficient to permit a jury to conclude that the defendant was actually aware of it.").

Additionally, denial of summary judgment is appropriate where there is "a substantial departure from accepted professional judgment and that the evidence of risk was sufficiently obvious to infer the defendants actual knowledge of a substantial risk to plaintiff." See Stevens v. Goord, 535 F.Supp. 2d 373, 385 (S.D.N.Y. 2008).

Counsel in his brief **contends that defendants** actions did not place me in extreme pain (pg. 7 of defendants' memorandum of law). How counsel could make such a ridiculous and outrageous claim is unimaginable as neither he nor his clients can state the level of pain I felt at all times relevant to this action (and to the present date). However, it is noteworthy that defendants sent me to pain

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management physicians at SUNY Health Science Center at Syracuse and that they prescribed methadone to control my pain, which defendants provided to me until they abruptly discontinued it. (The discontinuation of the methadone is also part of an unrelated action in which I claim retaliation by Wesley Canfield, M.D., et. al., for the bringing of the instant action. Davidson v. Canfield, et. al., Docket No. 07-CV-0599 is pending in this courthouse.)

The recurring defense theme is that defendants referred me to outside medical consultations and enacted smoking policies that they allege "medical defendants had no power to enforce..." (page 9 of defendants instant memorandum of law).

However, sending me to outside medical consultations is meaningless if the specialists' orders are ignored or discontinued by defendants without consultation with and approval by the specialists. Additionally, it is my claim that the medical defendants had all of the authority to enforce the no-smoking policy as it certainly pertained to my health and the health of everyone else in the prison. Moreover, in my case in order to enforce the specialist's orders they need only have housed me in the infirmary which is smoke-free.

The Court is also reminded of another prisoner's 42 U.S.C. 1983 in this district dealing with exposure to second-hand smoke in which summary judgment was denied to defendants in plaintiff Cedric Reid's case. (I previously brought this case to the Court's attention when it was reported in the New York Law Journal circa April of 2010. Mr. Reid is represented by Benjamin R. Dwyer, Esq., of Nixon Peabody, Buffalo, N.Y.)

As for the remaining claims, defendants counsel simply makes conclusory statements or offers his opinion as to what he deems to be non-serious allegations of my constitutional rights. However, these amount to genuine issues of material fact that only the fact-finder may determine.

#### CONCLUSION

Plaintiff has shown that genuine issues of material facts exist that require a jury trial. Accordingly, defendants' motion should be denied in all respects.

Dated: 21 August 2010



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